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I was invited to be the skunk at today's picnic, an assignment for which I am well-qualified by temperament if not actually by learning on the subject of the death penalty. It is some measure of the intellectual isolation of the academy that the job of dissent should fall to me. I am hardly a red-hot proponent of capital punishment, but am at best a tepid and (usually) grudging tolerator of it. Moreover, my expert's credentials are not in order. I have not attempted to think about capital punishment in any sustained way for twenty-five years. But Markus Dubber, who convoked this Symposium, couldn't find a more suitable nay-sayer than me. A great deal of information is contained in that observation. It seems that legal academia generally have nearly consummated the post-structuralist, post modernist ideal of "diversity," because just about all, despite our many races, creeds, and ethnicities and our several sexes, seem to think the same thing about capital punishment.

One chronic weakness of the debate about capital punishment has been its tendency, on both sides, to oversimplify the question at hand. As an example, one might offer the various attempts that have been made to measure "the marginal deterrence" of the death penalty,[1] as though the question was a straightforward empirical chore of measuring how many innocents could be saved from being murdered by hanging a murderer. On several grounds this way of thinking about the problem, to say nothing of way of conceptualizing the underlying question of utility, is not satisfactory.

First, if one rightly understands the problem it is no more possible to measure this than to measure the marginal contribution that one kidney makes to a person's physical well-being. A person can lose the entire function of one kidney without showing ill effects either in apparent general health or blood chemistry; yet we should not hesitate to say that losing one diminishes a person's health status, if for no other reason than the loss of resiliency to

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1. *See* Douglas W. Vick, *Poorhouse Justice: Underfunded Indigent Defense Services and Arbitrary Death Sentences*, 43 BUFF. L. REV. 329, 348 n.73 (1995).

possible future insults to the still-working kidney. It is, in other words, difficult to measure the "marginal contribution" of one kidney to the well-being of an individual first of all because the fact of joint causation or production makes it impossible to speak meaningfully of the marginal contribution made by one kidney. The matter is no easier when we try to ascertain the "marginal contribution" of any given penalty to the justice properties of the legal system.

Second, even if it were meaningful to discuss the marginal deterrent properties of the death penalty on the future behavior of potential murderers, we should *a priori* expect the value of the deterrent effect to be extraordinarily small. The price theory model of general deterrence, for example, requires a potential killer to consider how much the existence of capital punishment will affect the net value of a crime, ex ante its commission. Many murderers are not caught; many who are caught are not charged with murder; many who are charged with murder will be given the opportunity to plead guilty to another offense; those not given that opportunity will be tried but significant numbers of trials end up with acquittals, or with convictions for lesser included offenses; the vast majority of murder-1 convictions do not end with a capital sentence; in most cases in which a capital sentence is imposed it is not carried out; even if it is carried out many years—ten, fifteen, twenty—will have elapsed. It would be astounding, fantastic, for the difference between such a heavily-discounted future possibility and a long prison sentence to cast much of a shadow in the crude statistical calculations we make when attempting to measure such things. Yet the existence of a marginal deterrent effect is not by any means thus ruled out. It is seldom appreciated how slight the claim of marginal deterrence might be. If the existence of the death penalty caused one killer every quadrillion years to hesitate one extra femtosecond before pulling the trigger, then marginal deterrence would have resulted from the existence of the potential punishment of death. In that case we should say that the marginal deterrent effect was very small, but greater than zero. In practical application, though, it is reasonable to suppose that the margin is nowhere near so small.

Thanks to the work of Tom Tyler it should be obvious that the vision of how punishments produce general deterrence as suggested by price theory and its cousins is untenable as a descriptive matter, however valuable it remains as an analytical and predictive tool.[2] People do not decide whether or not to obey the law by con-

2. *See generally* TOM TYLER, WHY PEOPLE OBEY THE LAW (1990).

tinuously calculating whether the benefits of compliance outweigh the costs, but as an act of constrained rationality, made once at some threshold early in life and stuck with because of the regard in which they hold themselves as law-abiding persons. The implication of this result is that the general reputation of the criminal justice system for delivering justice (and not its reputation for delivering retribution or punishment) is its primary asset as a general deterrent to crime. The basic theme to which most of this Symposium's contributors have recurred is the contribution that capital punishment makes, and in the context of the real world can be expected to make, to the sovereign's reputation for dispensing justice. The ultimate test of the death penalty is whether it enhances the legal system's reputation for dispensing justice. That is the ultimate test of any penalty and for that matter of any procedure or institution involved in the justice system. The mission of the system is to generate a product, justice, which is invisible and impalpable yet which is also , as far as we can tell, more than just valuable—close to indispensable—to the operation of human communities. We should not be surprised if the customers of an expensive product that is invisible and impalpable complain that they are being short-weighted. But we should not be indifferent either, because justice as administered—its tangible outcropping is punishment—defines and bolsters a moral community, as Durkheim taught us, increases the solidarity of that community, and hence adds to its capacity for goodness, and subtracts from its disposition for badness.[3]

Claims about punishments or the institutions or procedures that lead to them must at least in concept pass the test of utility with respect to the reputation of the system for doing justice—for accurately defining that which is bad, for accurately adjudicating transgressions, and for punishing transgressions according to a schedule of punishments that are scalar and proportionate to the perceived seriousness of the offense. General deterrence will be a property of a well-functioning justice system, one that is seen to possess these characteristics. Justice in this sense recapitulates the reflective long-term values of those meant to be embraced in the political moral community to whom the laws are applicable—the community whose solidarity is to be increased and whose capacity for goodness is to expanded by the just enforcement of just laws. The death penalty, at least in the sense of having one on the books and not openly flouted by the judiciary, is evidently a part of this idea of justice in contemporary America, and if so then it must be

3. EMILE DURKHEIM, THE DIVISION OF LABOR IN SOCIETY 108-09 (1933).

understood to contribute, albeit in an unmeasurable way, to the general deterrence of the criminal law.

The death penalty as applied, however, is a different matter. Justice Blackmun was hardly the first person to question whether capital punishment could be imposed fairly, and no one's idea of justice is killing actually innocent people, which brings us to our papers.

Sam Gross shows that he is one of the deepest students of this problem by the argumentative strategy he employs.[4] He begins with the axiom that "death is different," from which almost inevitably flows an abolitionist denouement, because no justice system, however careful it may be, will avoid making mistakes. One might express the problem starkly by saying that there is always a non-zero chance that any given defendant is being executed (or otherwise punished) unjustly. Unlike Professor Gross, however, I believe these uncertainties are endemic to the justice system, and are not a particular problem of capital punishment. In this respect, death is not different; it is the same. The quality of justice in non-capital cases does not seem to me to be remarkably high. Most criminal cases are resolved by plea bargains that need bear little relation to what the police actually arrested the defendant for. Beyond that, it is easy to believe that the real world sees a good bit of "framing guilty men," the gallows-humorous name for the supposed police practice of planting fraudulent evidence to make a conviction possible. In cases where scrutiny of officers' behavior will not be great, where the adversarial system is functioning in nearly a perfunctory way—which is, after all, the norm in most non-capital cases but not in capital cases—"framing guilty men" ought to be easy. So I must say that Professor Gross's assumption, that the accuracy of adjudication in death cases is below average,[5] seems implausible, and consequently that his theorizing about why capital adjudication is specially faulty is at best premature. But none of this matters if "death is different."

On the other hand, supposing that the accuracy of adjudication in capital cases is at least average for criminal cases, an interesting paradox emerges, one that ought to trouble desert theorists considerably. As Professor Gross concedes,[6] the extra scrutiny that death cases get because they are death cases may be the factor that uncovers the innocence of wrongly convicted men. One of the advantages of capital punishment is: if you know you have to hang a

4. *See generally* Samuel R. Gross, *The Risks of Death: Why Erroneous Convictions are Common in Capital Cases*, 44 BUFF. L. REV. 469 (1996).

5. *Id.* at 470-71.

6. *Id.* at 497-98.

man in a fortnight (or even in fourteen years), it concentrates the mind wonderfully—among other things on the possibility that one is punishing an innocent man. Corollary would seem to be that, without the death penalty, even more innocent men would languish in prison, maybe for life, maybe without possibility of parole. If true, then death penalty abolitionists must be taken to have embraced an implicit moral calculation about the "different-ness" of death, in which it is worse to execute one guilty man than to imprison X innocent ones (leaving it to the reader, or Professor Gross, to assign a value for X).

My friend and colleague Susan Bandes' paper raises the question of how one can defend a world in which it is not formally unjust to execute a person whose guilt or innocence is still an open question.[7] Guilt or innocence cannot be raised as of right at the collateral phase of a capital case (where only constitutional rights can be litigated), which might lead to the absurdity of saying that innocent people have no right not to be executed!

It is an excellent point. But for that matter, one might counter with the question why guilt or innocence should not always be a continuously open question in any case? When one considers the chances of the system making an error about who committed a crime, what his mental state was at the time and so on, why should it not lead to the conclusion that additional process, aimed at perfecting the accuracy of final judgments, ought to be provided for all along the way, and not just in connection with habeas corpus practice. Imposing the death penalty should call for procedures at least as exacting as deciding the winner of Stanley Cup. If we would like to be absolutely certain that we do not punish the innocent, we should have more than one trial. We should insist that guilt be established beyond a reasonable doubt in the best two-out-of-three. Make that three out of five. Nor can we with consistency limit ourselves to death cases only: punishing the innocent is not justifiable though the punishment be only life in prison, or any time in prison, or even a fine.

Arguments of this sort are not to be met with the exhortations of principle but those of expediency. We are social human beings, and we cannot transmit justice godlike without institutional mediation. In order to run institutions, we need procedures; the characteristic of procedures is that they proceed, and then at some point they come to an end and we move on. Infinite procedure is not to be dreamt of though this entails a recognition that there is always

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7. *See generally* Susan Bandes, *Simple Murder: A Comment on the Legality of Executing the Innocent*, 44 BUFF. L. REV. 501 (1996).

a non-zero chance that we have caught and are punishing an innocent. If we have any sense, what we seek is optimal procedure—and what we are trying to optimize is the reputation of the system for dispensing justice—see above—understanding by the way that the best way to get a certain reputation over the long run is well and truly to deserve it. And so it comes that we are constrained by the Goldilocks procedural constant, namely, not too much procedure, not too little procedure, but procedure just right, taking into account all relevant considerations.

We are to consider the death penalty in context, and how real lawyers behave with real procedures in the real world is of the essence of the context that must be considered. In context, Professor Bandes plea that we give innocent people a constitutional right not to be executed translates into the legal principle that guilt or innocence should be broachable as of right on habeas. This proposition, in turn, involves what I think could be called the Poppa Bear corollary to the Goldilocks Constant, namely, that would be too much procedure.

How does one know how much is too much? Apart from context, the question is not meaningful, but in context it is not so hard to tell that granting Professor Bandes' proposal would be tantamount to the abolition of the death penalty. Crusading capital punishment abolitionists are already very adroit at gaming the system so as to ensure fifteen year lags between sentence and punishment. Professor Bandes' proposal all but invites a flurry of new minitrials, conducted, it goes without saying, seriatim, concerning of the impact of (assertedly) newly discovered evidence. Along with new fact-finding procedures one must expect also the efflorescence of a motions practice concerning itself with when "new" evidence really is new, and when its oversight at trial may be later corrected. Just as one does not put sharp objects in the hands of Tourette's patients, one does place such an easily mishandled procedural device in the hands of a death penalty bar whose history is to interpose motions for purposes of delaying justice—what the system and the community call justice even if that portion of the bar do not. I anticipate the response: that this is to make uncharitable assumptions about how death penalty lawyers conduct business. At this point in the dialogue one must surely invoke the philosopher's sovereign prerogative of laughter.

It is absolutely correct that we must be fastidious about the imposition of grave punishments. There is no serious argument for summary executions as a part of a working criminal justice system. But neither can there be a serious argument for ten or fifteen years of delay in the imposition of punishment. Professor Zimring says these delays simply resonate system ambivalence, and surely that

is a part of the truth, but only a part. Indeed we ought to be ambivalent when we impose grave punishments, for that matter including punishments that are not capital. Bad enough that, in a causally deterministic world the question of personal responsibility is inescapably fraught with moral ambiguity. What is as bad or worse, our capacity is severely limited in reconstructing what really happened when the crime was committed, and actually "knowing" the basis upon which we punish, constrained as we are by budgets and by the intellectual imperfections of human beings. In fact one might explain much of criminal procedure as a reflection of the ambivalence that is rightly felt by a civilized society when a person, even an evidently bad one, is to be crushed metaphorically or killed in reality by the state.

That this is the human condition as respects the institution of punishment one should not doubt. This line of argument should lead one to say that it is important to be careful about imposing grave punishments. It does not lead to the conclusion that one should never impose any penalty or any particular penalty including the death penalty. Nor, indeed, is it at all obvious that "ambivalence" or other social psychological constructs are required in order to explain the observed phenomenon of ultra-delay in the imposition of capital punishment. There is a more parsimonious explanation. Certain judges—it doesn't take many, and professional death penalty litigators know very well who they are—have an antipathy toward the death penalty, and protract the appellate or collateral process in order to delay or undo the imposition of this form of punishment. It is past rational contradiction that at least some judicial behavior is better explained by antipathy than carefulness. One thinks in this connection of Chief Justice Bird's legendary fifty-four consecutive votes to overturn capital sentences[8]—votes that one may well think were pretextual, advancing procedural or constitutional arguments not in good faith but as subterfuge in service of an ulterior purpose, namely, defeating the use of a lawful penalty that she personally found too distasteful to impose. Or think of Judge J. Skelly Wright's so-clever injunction against the use of intravenous solutions for executions because such were not in compliance with the Food, Drug and Cosmetic Act, having never been shown to be "safe and effective" for the intended use of killing people.[9] These examples do not educe fastidiousness and they do not instance ambivalence. What they

8. Frank Clifford, *Primary Politics "Bankrupt," Justice Bird Declares*, L.A. TIMES, June 4, 1986, at 14.

9. Chaney v. Heckler, 718 F.2d 1174, 1176-78 (D.C. Cir. 1983), *rev'd*, 470 U.S. 821 (1985).

rather exhibit is plain old-fashioned dumb insolence, a form of insubordination by those under an obligation to uphold the law. Judges who cannot bring themselves to stand by their oath of office should not be seated on the appellate bench but, perhaps, in an adjunct professor's chair at a law school where their lawlessness can do little harm.

If one declines to recognize a right to re-raise guilt or innocence on habeas, what one is left with to head off even patent travesties of justice is executive clemency. As Bob Weisberg reminds us, this is not a perfect tool for getting justice.[10] Governors' mansions are perpetually liable to be filled with superannuated class presidents whose dreams of further glory could be jeopardized by the commutation of a death sentence, even one that ought to be commuted, thereby laying themselves open to the "soft on crime" reproach from competitors in imagined future Presidential debates. What has happened before can happen again. But executive clemency proceedings need not be worthless. They can be formal and careful affairs if the executive so chooses. Illinoisians will remember the Gary Dotson rape case from 1985, in which Governor James Thompson took many hours at a public hearing before deciding to commute the sentence of a man convicted of rape on the strength of a later-recanted denunciation.[11] And even if it were a more nearly perfect instrument than it is, one senses that executive clemency would not answer the needs of the death penalty bar, because executive clemency is not "as of right" and hence cannot readily be entangled in the anaconda-coils of due process and more process that capital punishment cases prompt.

Professors Bandes and Gross have both correctly identified the central liability of capital punishment as the risk of executing the innocent. When an execution is next shown up as a miscarriage of justice—one does not say "if" because sooner or later a mistake must be made—we will test whether the public's professed attachment to the death penalty was serious after all or the mere petulance of the Big Babies that Michael Kinsley, Peter Jennings and many other intellectuals believe the public to be. One important test of seriousness, after all, is one's willingness to proceed with the business in hand with a realistic rather than idealized, which is to say childish, notion of the perfectibility of governmental functions like the dispensing of justice. The ultimate contextualizing fact for the death penalty is that the criminal justice system is run by that

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10. *See generally* Robert Weisberg, *The New York Statute as Cultural Document: Seeking the Morally Optimal Death Penalty*, 44 BUFF. L. REV. 283 (1996).

11. *See* E.R. Shipp, *Sentence is Commuted in Illinois Rape Case*, N.Y. TIMES, May 13, 1985, at A1.

human beings and therefore mistakes will be made. Institutions whose legitimacy is not robust enough to survive this fact of life are beyond prescription.